

To:
Margrethe Vestager
Commissioner for Competition

CC:
- Frans Timmermans, First Vice-President for Better Regulation, Inter-institutional Relations, the Rule of Law and the Charter of Fundamental Rights
- Corina Crețu, Commissioner for Regional and Urban Policy

Brussels, 7 March 2016

Better EU rules for better services of general interest in housing

Dear Mrs Vestager,

We have a vision of a Europe which provides access to decent and affordable **housing for all in socially, economically and environmentally sustainable communities** where everyone is enabled to reach their full potential.

Housing is a basic need and a human right that needs the protection and constant attention of the European Union, Member States, local and regional authorities. More than 40.000 social, cooperative and public housing providers are helping in this task.

Considering that

the right to **access to housing** and **housing assistance** are recognised in the Charter of Fundamental Rights of the EU, in the European Social Charter, in the Universal Declaration of Human rights, as well as in many national constitutions;

Member States recognise¹:

- the essential role and **wide discretion of national, regional and local authorities** in providing and organising services of general economic interest (SGEI) as closely as possible to the needs of the users;
- the **diversity between various SGEI** and the **differences in the needs** and preferences of users;
- **A high level of quality, safety and affordability**, equal treatment and the **promotion of universal access**

The European Parliament² regrets the trend to **restrict the provision of social housing**, and

¹ Protocol 26, Treaty on the Functioning of the EU

² Resolution of 11 June 2013 on social housing in the European Union (2012/2293)

invites Member States to include the often-excluded group of **middle class families** in social housing programmes; asks the Commission to **clarify the definition of social housing based on exchanges** of best practices and experience, taking into account the different ways social housing is conceived in States, regions and local communities.

National, local and regional authorities have the possibility to **entrust the provision of social housing and related services to private and public undertakings as an SGEI and compensate the net costs incurred**. That is the case in many member states represented by Housing Europe.

The European Court of Justice³ has held that this does not constitute State aid if 1) it is a compensation for a **public service obligations that is clearly defined**; 2) the **parameters** for the compensation are established in advance in an objective and transparent manner; 3) the **compensation does not exceed what is necessary** to cover all or part of the SGEI costs and 4) the undertaking is chosen through a **public procurement** procedure or if the level of compensation is determined on the basis of an **analysis of the net costs which a typical undertaking**, well run and adequately equipped, would have incurred for those SGEI obligations. These are known as the Altmark-criteria.

The European Commission's role in this respect is to keep under constant review all systems of aid existing in Member States and ensure compensation remains necessary and proportional. If SGEI compensation is not following the Altmark-criteria then it constitutes state aid and the Commission's SGEI Decision (2012/21/EU) can be applicable. It exempts Member States from the obligation to notify this state aid under certain conditions. For social housing it includes the **limitation to 'disadvantaged citizens or socially less advantaged groups'**.

This limitation clashes with the subsidiarity principles mentioned in article 1 of the SGEI Protocol to the Treaty and **restricts the provision of social and affordable housing and ensuring socially diverse communities and cities**. The Swedish and Dutch cases are well-known examples of the implication for cities, regions and national housing systems.

Finally, we want to remind that the effective use of regional and urban support for social housing through the **European Fund for Regional Development** also depends on the capacity of authorities to use an adequate SGEI framework.

Therefore, we call upon the European Commission to recognise that

³ Altmark Trans and Regierungspräsidium Magdeburg (C-280/00) as confirmed recently in EasyPay vs Ministerski savet na Republika Bulgaria (Case C-185/14)

All European citizens should have the possibility to access decent and affordable housing in thriving and safe communities. This includes a healthy dwelling in an enabling environment where every person can feel safe and can develop its capacities.

Throughout the EU important resources and people are mobilized to contribute to **social housing objectives⁴ in the form of service of general economic interest (SGEI)** and more efforts in that direction would improve the financial, environmental and social situation of EU citizens in line with EU2020 objectives.

The wide discretion of national, regional and local authorities in the definition of the scope, organisation and financing of SGEI based on their cultural, economic and democratic choices is important to **adapt to local and community needs.**

Based on the EU Treaties, neither the EU nor the Commission, have the competence to regulate the scope of social and affordable housing as SGEI as long as state compensation sticks to the **principles of proportionality and necessity:**

- SGEI obligations fulfil local, regional or national needs
- these needs are not met according to assessments by authorities and
- compensation amounts do not exceed net costs⁵ and only benefit SGEI.

Despite the wide discretion of Member States, the **Commission imposed its own definition of social housing** (based on an Irish case, see Annex) in the SGEI Decision. Since 2005 this applies to every SGEI in social housing in the EU.

The EU **intervention** in the field of social housing is not only clashing with Member States' competencies, it is also **unnecessary** as the Commission has the power to act in case of a faulty SGEI definition. However, the demonstration of such any 'manifest error'⁶ must be done case-by-case, involving the local and regional housing market(s) and socio-economic needs at stake. The use of a pre-defined concept of social housing at EU level is too arbitrary. Above all, it blocks effective responses to unanswered social and economic needs.

Therefore, we ask the European Commission to

- **Keep the current exemption** of social housing under the SGEI Decision and not **link it to a target group defined by the Commission**, such as '*disadvantaged citizens or socially less advantaged groups*'. The mentioning of target groups by the Commission

⁴ Housing Europe members represent 43 000 local housing organizations responsible for approximately 11% of all existing dwellings in Europe. Their investments are estimated at around 40 billion euro per year (2012).

⁵ This includes a reasonable benefit according to SGEI Decision (2012/21/EU)

⁶ Case T-289/03 BUPA, 12 February 2008

conflicts with the subsidiarity principle. No other service addressed explicitly in the SGEI Decision is linked to a specific target group defined by social position.

- The revised SGEI Decision should cover the provision of social services by undertakings, including the **provision of social housing for categories of households or specific groups who, due to solvency constraints or special needs, are unable to fulfil their housing needs by obtaining decent and affordable housing at market conditions in urban or rural areas, as well as including the provision of decent and affordable housing in markets where such housing is not available in a sufficient quantity or way.**
- Help to **provide guidance to use the SGEI rules** for social and affordable housing and provide assistance to improve legal certainty and transparency, including the prevention of overcompensation.
- **Work together within the EU Urban Agenda** with relevant actors, such as citizens, cities and housing providers, to achieve better and more coherent European policies (on poverty reduction, social cohesion, energy, migration, mobility, economic stability, European funding) that tackle the multiple challenges that cities and housing providers are facing.
- Recognize the wide discretions of Member States in case Services of General Economic Interest are the **object of country specific recommendations within the European Semester** and provide (ex-post and ex-ante) socio-economic impact studies in the Commission's assessments in such cases.

We look forward to discuss these points with your directorate-general and offer our cooperation to work towards better SGEI regulation to answer the different needs for social and affordable housing in Europe.

Yours sincerely,



Marc Calon

President

Housing Europe

Annex

Article 106 TFEU:

2. *Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in the Treaties, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Union.*

3. *The Commission shall ensure the application of the provisions of this Article and shall, where necessary, address appropriate directives or decisions to Member States.*

PROTOCOL 26 of the Treaty on the Functioning of the European Union on SERVICES OF GENERAL INTEREST⁷

THE HIGH CONTRACTING PARTIES,

WISHING to emphasise the importance of services of general interest, HAVE AGREED UPON the following interpretative provisions, which shall be annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union:

Article 1. The shared values of the Union in respect of services of general economic interest within the meaning of Article 14 of the Treaty on the Functioning of the European Union include in particular:

- the essential role and the wide discretion of national, regional and local authorities in providing, commissioning and organising services of general economic interest as closely as possible to the needs of the users;

- the diversity between various services of general economic interest and the differences in the needs and preferences of users that may result from different geographical, social or cultural situations;

- a high level of quality, safety and affordability, equal treatment and the promotion of universal access and of user rights.

Article 2. The provisions of the Treaties do not affect in any way the competence of Member States to provide, commission and organise non-economic services of general interest.

⁷ According to Article 51 of the treaty on European Union, the Protocol 26 shall form an integral part of the Treaties. Therefore Protocol 26 is to be treated as primary law.

Commission's letter on Dutch social housing and corporations (2005)⁸:

- (...) according to the Commission's recent established practice, certain limits are imposed on what may be regarded as a SGEI within the framework of social housing.
- The "social" justification for SGEI status under the Irish scheme is based on stricter criteria than is the case [in Dutch social housing]
- The definition of activities of housing association must therefore maintain a direct link with socially disadvantaged households and not only with a maximum value of homes.

Commission Decision on Dutch social housing and corporations (2009)

38. In the Article 17 letter of 14 July 2005, the Commission services took the preliminary view that the Netherlands should amend the public service definition of wocos so that the social housing would be provided to a clearly defined target group of disadvantaged citizens or socially less advantaged groups. Any commercial activities by the wocos should be carried out on market terms and should not benefit from State aid.

40. In view of the above and having discussed the Commission's concerns with the Dutch authorities, the Commission would consider the following measures appropriate to ensure compliance with the EC State aid rules:

- Limitation of social housing to a clearly defined target group of disadvantaged citizens or socially less advantaged groups, in line with the Commission Decision 2005/842/EC of 28 November 2005 on the application of Article 86(2) of the EC Treaty to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest⁸ ("SGEI Decision").
- The offer of social housing by the wocos should be adapted to the demand from disadvantaged citizens or socially less advantaged groups.

54. (...) Furthermore recital (16) of the SGEI Decision provides that "undertakings in charge of social housing providing housing for disadvantaged citizens or socially less advantaged groups, which due to solvability constraints are unable to obtain housing at market conditions, should benefit from the exemption from notification provided for in this Decision". This recital confirms that the public service to which the exemption under Article 106 (2) applies is linked to providing accommodation to disadvantaged citizens or socially less advantaged groups.

55. Overall the Commission considers that provision of social housing may qualify as service of general economic interest if it is restricted to a target group of disadvantaged citizens

⁸ DG Competition letter of 14/7/2005 to the Dutch government regarding state aid measure E 2/2005

or socially less advantaged groups, while Member States have a wide margin as regards the size of the target group and the exact modalities of applying the system based on a target group.

58. In the interest of social mixity and social cohesion, the Dutch authorities envisage that no more than 10% of the dwellings can be rented out to higher income groups, while the remaining 90 % of the dwellings in each woco are reserved exclusively to the defined target group. The Commission considers social mix and social cohesion to be valid public policy objectives. The Commission notes that the proportion of tenants from higher income groups will be strictly limited to a small number. Furthermore, also the 10% will be allocated on the basis of objective criteria with element of social prioritisation. Temporary exceptions that may be granted from the 90% rule contain sufficient safeguards to ensure that the allocation of housing remains focused on the target group: any temporary adjustment cannot go further than an 80% ratio; it will be compensated by a corresponding change upwards in other wocos; and the exception is always limited